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ABSTRACT

This booklet discusses the provision of assistive technology through state vocational rehabilitation programs to help individuals with disabilities in employment settings. It reviews vocational rehabilitation eligibility criteria, specific goods and services that can be provided, issues to keep in mind when using this system to obtain assistive technology, appeal procedures, and the advocacy services available through the Client Assistance Programs. Court decisions that have denied or upheld a client's eligibility for vocational rehabilitation services and assistive technology devices and services are analyzed, and obligations of colleges and universities to students with disabilities are reviewed. The report concludes that the vocational rehabilitation systems can be a crucial resource for assistive technology for people with disabilities who are planning to enter the workforce. The U.S. Congress and the Rehabilitation Services Agency have strengthened the mandate of state vocational rehabilitation agencies to provide a range of service to maximize employability and economic self-sufficiency. The booklet posits that although the reading of the maximization requirements by the courts to date has yielded mixed results, the language of the law, regulations, and policy directives continue to support a reading that favors maximization of employment in individual cases. (CR)

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FUNDING OF ASSISTIVE TECHNOLOGY

State Vocational Rehabilitation Agencies and Their Obligation to Maximize Employment

Assistive Technology Funding & Systems Change Project
United Cerebral Palsy Associations
Washington, D.C.

National Assistive Technology Advocacy Project
A Project of Neighborhood Legal Services, Inc.
Buffalo, New York

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TABLE OF CONTENTS

LIST OF ACRONYMS iii

I. Introduction 1

II. Eligibility for Vocational Rehabilitation Services 1
- A. Basic Eligibility Criteria 1
- B. Evaluation of Eligibility 3

III. The Individualized Plan for Employment 3
- A. Informed Choice 3
- B. Developing the Individualized Plan for Employment 4

IV. Available Services 5
- A. Required Services 5
- B. Assistive Technology 8
- C. Post-Employment Services 10
- D. Out-of-State Services 11

V. Financial Need Criteria 12

VI. Maximization of Employment 12
- A. Pre-1986 Standard 12
- B. The Post-1986 Maximization Requirements 13
- C. Rehabilitation Services Administration Policy Directive 14
- D. Court Decisions 15

VII. Comparable Services Requirement 18
- A. Basic Requirements 18
- B. Defaulted Student Loans 19
  - 1. Effect of Defaulted Student Loans on VR Funding for College 19
  - 2. Forgiveness of Student Loans 20
  - 3. Repayment of Defaulted Student Loans 20

VIII. Purchase of AT for Special Education Students in Transition: Who Pays? 21
- A. Transition Services under the Individuals with Disabilities Education Act 21
- B. Transition Obligations Under the Rehabilitation Act 22
- C. Reading the Special Education and VR Laws Together 23

IX. AT for the College Student: Who Pays? 24
- A. Obligations of Colleges and Universities 24

B. Obligations of the Vocational Rehabilitation System 25
C. Reading the Two Sets of Requirements Together 26

X. Hearing and Appeal Rights 27

XI. Conclusion 28

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LIST OF ACRONYMS

AT:	Assistive technology
ADA:	The Americans with Disabilities Act
IDEA:	Individuals with Disabilities Education Act
IEP:	Individualized education program
IPE:	Individualized plan for employment, formerly referred to as the IWRP
IWRP:	Individualized written rehabilitation plan
Rehab '98:	1998 amendments to the Rehabilitation Act
RSA:	Rehabilitation Services Administration
Section 504:	Section 504 of the Rehabilitation Act of 1973
SSDI:	Social Security Disability Insurance
SSI:	Supplemental Security Income
VR:	Vocational rehabilitation
WIA:	Workforce Investment Act, 1998 federal law that included amendments to the VR laws

I. Introduction

The services available through each state's vocational rehabilitation (VR) system can play a critical role in assisting people with disabilities to enter the work force. As with any other area of life, assistive technology (AT) can greatly enhance the employment options for many people with disabilities. How does one enter the VR system? What are the obligations of the VR system to provide AT for individuals with disabilities? This booklet reviews VR eligibility criteria, specific goods and services that can be provided, issues to keep in mind when using this system to obtain AT, appeal procedures and the advocacy services available through Client Assistance Programs.

The Rehabilitation Act was first passed in 1973. Congress, pursuant to Title I of the Rehabilitation Act, gives money to states to provide VR services to persons with disabilities. 29 U.S.C. §§ 701 *et seq.*; 34 C.F.R. Part 361. To receive funding, a state must submit a plan consistent with the law. 29 U.S.C. § 721. It must designate a single state agency to administer the plan, unless it designates a second agency to provide services to individuals who are blind. *Id.* § 721(a)(2).

VR agencies can fund a wide range of goods and services, including "rehabilitation technology" (i.e., AT), that are connected to a person's vocational goal. Congress has stated that VR services are to empower individuals to maximize employability, economic self-sufficiency, independence and integration into the work place and the community through "comprehensive and coordinated state-of-the-art programs." *Id.* § 701(b)(1)(emphasis added).

On August 7, 1998, President Clinton signed into law the Workforce Investment Act of 1998 (WIA). P.L. 105-220, 112 Stat. 936. Included within the Workforce Investment Act were the Rehabilitation Act Amendments of 1998 (Rehab '98), reauthorizing the Rehabilitation Act through 2003. The WIA is a major federal effort to incorporate a myriad of federal job training programs into a coordinated, comprehensive system. States are required to develop statewide and local plans and to include the VR system in that planning process. Although Congress had contemplated merging the VR system into the WIA, VR is maintained as a separate program to meet the vocational training needs of people with disabilities. But, the vocational training opportunities of the state workforce investment system are clearly intended to be available to individuals with disabilities. *See* 29 U.S.C. § 701(b)(1)(A).

II. Eligibility for Vocational Rehabilitation Services

A. Basic Eligibility Criteria

To receive services, an individual must be disabled and require VR services "to prepare for, secure, retain or regain employment." *Id.* § 722(a)(1). Therefore, any service an individual is to receive from the VR system must be connected to an ultimate employment goal. Potential employment outcomes were expanded by Rehab '98. Employability had been defined as full or part-time competitive employment to the greatest extent practicable, supported employment or other employment consistent with the individual's strengths, abilities, interests and informed choice. 34 C.F.R. § 361.5(b)(15). Rehab '98 adds self-employment, telecommuting and business ownership as successful employment outcomes. 29 U.S.C § 705(11)(C).

Persons must show a mental, physical or learning disability that interferes with the ability to work. The disability need not be so severe as to qualify the person for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits. The disability must only be a substantial impediment to employment. *Id.* § 705(20)(A).

Rehab '98 changed the designation of individual with a "severe" or "most severe" disability to individual with a "significant" or "most significant" disability. *Id.* § 705(21). Recipients of SSDI or SSI are presumed to be eligible for VR services, as individuals with a significant disability, provided they intend to achieve an employment outcome. *Id.* § 722(a)(3).

Although VR services may be denied if a person cannot benefit from them, a person is presumed capable of employment, despite the severity of a disability, unless the VR agency shows by clear and convincing evidence that he or she cannot benefit from services. *Id.* § 722(a)(2); 34 C.F.R. § 361.42(a)(2). Prior to determining that a person with a disability is incapable of benefitting from VR services because of the severity of the person's disability, the state VR agency must explore the individual's work potential through a variety of trial work experiences, with appropriate supports. These trial work experiences must "be of sufficient variety and over a sufficient length of time to determine" whether the individual is eligible. 29 U.S.C. § 722(a)(2)(B). The only exception is for the "limited circumstances" in which the individual cannot take advantage of such experiences, even with support. *Id.* For individuals denied services because they are determined to be incapable of benefitting, the decision must be reviewed within 12 months by the VR agency and thereafter, if requested. *Id.* § 722(a)(5)(D).

If a state does not have the resources to provide VR services to all eligible individuals who apply, it must specify in its State VR Plan the order to be followed in selecting those individuals who will receive services. This is called the "Order of Selection." It must also provide justification for the Order of Selection it establishes. However, the state must ensure that individuals with the most significant disabilities are selected first to receive VR services. *Id.* § 721(a)(5). Rehab '98 makes some provision for those who are not served. They are entitled to an appropriate referral to other state and federal programs, including other providers within the state workforce investment system. *Id.* §§ 721(a)(5)(D) and 721(a)(20).

The state VR agency must enter into an agreement with other providers within the statewide workforce investment system, which may include intercomponent staff training and technical assistance regarding:

> [T]he promotion of equal, effective, and meaningful participation by individuals with disabilities in workforce investment activities in the State through the promotion of program accessibility, the use of nondiscriminatory policies and procedures, and the provision of reasonable accommodations, auxiliary aids and services, and rehabilitation technology, for individuals with disabilities.

Id. § 721(a)(11)(A)(i)(II). Most of these requirements are already mandatory for recipients of federal

funds pursuant to Section 504 of the Rehabilitation Act of 1973 (*id.* § 794) and for providers that are covered by the Americans with Disabilities Act. 42 U.S.C. §§ 12101 *et seq.*

B. Evaluation of Eligibility

The state VR agency must determine eligibility within a reasonable period of time, not to exceed 60 days, after the individual submits an application for services. 29 U.S.C. § 722(a)(6). The VR agency can exceed 60 days for its determination under two circumstances: (1) if the individual requires an extended evaluation to determine eligibility; or (2) if the individual is notified that exceptional and unforeseen circumstances beyond the control of the agency preclude it from completing the determination within 60 days and the individual agrees that an extension of the time is warranted. *Id.*

Information used to determine eligibility includes: (1) existing data, such as medical reports, Social Security Administration records and education records; and (2) to the extent existing data is insufficient to determine eligibility, an assessment done by or obtained by the VR agency. *Id.* § 722(a)(4)(C).

III. The Individualized Plan for Employment

After eligibility is established, the next step is to develop a written plan setting forth the individual's employment goal and the specific services to be provided to assist the individual to reach that goal. This plan had been called the individualized written rehabilitation plan (IWRP). The name has been changed by Rehab '98 to the individualized plan for employment (IPE). *Id.* § 722(b). This plan, which is to be developed by the consumer, with assistance from the VR counselor, is to be set forth on a form provided by the state VR agency. *Id.* § 722(b)(2)(A).

Prior to developing the IPE, there must be a comprehensive assessment, to the extent necessary to determine the employment outcome, objectives and nature and scope of VR services. The assessment is to evaluate the unique strengths, resources, priorities, abilities and interests of the individual. The assessment can cover educational, psychological, psychiatric, vocational, personal, social and medical factors that affect the employment and rehabilitation needs of the individual. *Id.* § 705(2)(B). It may also include a referral for the provision of rehabilitation technology services, "to assess and develop the capacities of the individual to perform in a work environment." *Id.* § 705(2)(C).

A. Informed Choice

It has been the policy of the VR system that all activities are to be implemented consistent with the principles of "respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities." *Id.* § 701(c)(1)(emphasis added).

Rehab'98 revolutionizes informed choice. VR agencies must assist individuals in their exercise of informed choice throughout the VR process, including the assessment, selection of an employment outcome, the specific VR services to be provided, the entity which will provide the services, the method for procuring services and the setting in which the services will be provided. *Id.* §§ 720(a)(3)(C) and 722(d)(1)-(5). The VR agency must still approve the IPE, but the individual decides the level of involvement, if any, of the VR counselor in developing the IPE. *Id.* §§ 722(b)(1)(A) and 722(b)(2)(C).

The stated reason for such an expanded role for the consumer was Congress' belief "that a consumer-driven program is most effective in getting people jobs." Congressional Record–House, H6693, July 29, 1998. To foster effective informed choice, the state must "develop and implement flexible procurement policies and methods that facilitate the provision of services, and that afford eligible individuals meaningful choices among the methods used to procure services." 29 U.S.C. § 722(d)(3)(emphasis added).

The legislative history underscores the impact of these provisions:

> The Conferees expect that these changes will fundamentally change the role of the client-counselor relationship, and that in many cases counselors will serve more as facilitators of plan development.

Congressional Record–House, H6693, July 29, 1998.

While Rehab '98 re-writes the rules on informed choice, this does not mean that individual is free to select whatever employment goal he or she wants. The goal must still be consistent with the individual's abilities. Further, because the ultimate objective of the VR system is employment, there must be some likelihood that the goal will lead to a viable employment outcome.

In *Matter of Wenger*, 504 N.W.2d 794 (Minn. Ct. of App. 1993), the court affirmed the VR agency's rejection of the petitioner's desired VR objective. The court found that there was substantial evidence in the record that the petitioner's desired VR goal "was not likely to lead to gainful employment." *Id.* at 799. Because the case was decided prior to the changes in informed choice made by Rehab '98, the references in the case to the IWRP (now IPE) being "jointly developed" are no longer applicable. Nevertheless, the court's decision, that the VR objective was not likely to lead to employment and, therefore, the VR agency was justified in rejecting it, is still viable.

B. Developing the Individualized Plan for Employment

Any service to be provided to meet the employment goal must be specified on the IPE. The IPE should enable the individual to achieve the agreed upon employment objectives and must include the following:

1. The specific employment outcome, chosen by the individual, consistent with the unique strengths, concerns, abilities and interests of the individual;

2. The specific VR services to be provided, in the most integrated setting appropriate to achieve the employment outcome, including appropriate AT and personal assistance services;

3. The timeline for initiating services and for achieving the employment outcome;

4. The specific entity, chosen by the individual, to provide the VR services and the method chosen to procure those services;

5. The criteria for evaluating progress toward achieving the employment outcome;

6. The responsibilities of the VR agency, the individual (to obtain comparable benefits) and any other agencies (to provide comparable benefits);

7. In states which have a financial needs test (see below), any costs for which the individual will be responsible;

8. For individuals with the most significant disabilities that are expected to need supported employment, the extended services to be provided; and

9. The projected need for post employment services, if necessary.

29 U.S.C. § 722(b)(3).

The IPE must be reviewed at least annually and, if necessary, amended if there are substantive changes in the employment outcome, the VR services to be provided or the service providers. Any changes will not take effect until agreed to by the individual and the VR counselor. *Id.* § 722(b)(2)(E).

IV. Available Services

A. Required Services

VR services are defined as any services, described in an IPE, which are necessary to assist an individual with a disability in "preparing for, securing, retaining, or regaining an employment outcome that is consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individual." *Id.* § 723(a). The VR agency is to ensure that all necessary services to equip the individual for employment are provided. As noted above, if there are insufficient resources to fully meet the needs of all individuals with disabilities in the state, the state must go to

an Order of Selection. It cannot choose to provide only some services to eligible individuals to save costs. As more fully discussed in the comparable benefits section below, however, the State VR agency can look to other providers to fund the needed services.

The services which are available from the VR system are incredibly broad and varied. Essentially, whatever an individual with a disability needs to overcome a barrier to employment can be covered. For example, in *Turbedsky v. PA Dept. of Labor and Industry*, 65 Pa.Cmwlth. 363, 442 A.2d 849 (Pa. Cmwlth. Ct. 1982), the court ordered the VR agency to provide a full-time attendant for the petitioner. He was respirator dependent and a quadriplegic, living in an institution. He needed a full-time attendant to monitor his ventilation system and attend to his needs so he could live in the community. The VR agency was funding his attendance at college. The petitioner argued that his likelihood for success in college and, ultimately, employment would be enhanced by living in the community. The court agreed. It found that the full-time attendant care was a covered service and necessary for the individual to receive the "full benefit" of college. The court rejected the VR agency's argument that it had discretion to determine the services to be provided to eligible individuals. According to the court, the VR agency is not free to limit VR services to one individual in order to provide other services to other people. In such cases, the VR agency must resort to the Order of Selection.

Services must include, but are not limited to, the following:

1. The assessment to determine eligibility and needs, including, if appropriate, by someone skilled in rehabilitation technology (i.e., AT).

2. Counseling, guidance and job placement services and, if appropriate, referrals to the services provided by WIA providers.

3. Vocational and other training, including higher education and the purchase of tools, materials and books.

4. Diagnosis and treatment of physical or mental impairments to reduce or eliminate impediments to employment, to the extent financial support is not available from other sources, including health insurance or other comparable benefits. This may include:

    a. corrective surgery;

    b. therapeutic treatment;

    c. necessary hospitalization;

    d. prosthetic and orthotic devices;

e. eyeglasses and visual services;

f. services for individuals with end-stage renal disease, including dialysis, transplants and artificial kidneys; and

g. diagnosis and treatment for mental or emotional disorders.

5. Maintenance for additional costs incurred during rehabilitation. In *Scott v. Parham*, 422 F.Supp. 111 (N.D. Ga. 1976), the Court struck down a limitation on maintenance to only those receiving VR services outside of the home or home community because it failed to account for the individualization requirements of Title I of the Rehabilitation Act.

6. "Transportation, including adequate training in the use of public transportation vehicles and systems, that is provided in connection with the provision of any other service described in this section and needed by the individual to achieve an employment outcome (emphasis added)." Transportation may include vehicle purchase. Under the regulations, transportation is defined as "travel and related expenses that are necessary to enable an applicant or eligible individual to participate in a [VR] service." 34 C.F.R. § 361.5(b)(49). A note, following the regulation, specifically states that "[t]he purchase and repair of vehicles, including vans" is an example of an expense that would meet the definition of transportation. *Id.*, Note.

7. Personal assistance services while receiving VR services.

8. Interpreter services for individuals who are deaf, and readers, rehabilitation teaching and orientation and mobility services for individuals who are blind.

9. Occupational licenses, tools, equipment, initial stocks and supplies.

10. Technical assistance for those who are pursuing telecommuting, self-employment or small business operation.

11. Rehabilitation technology (i.e., AT), including vehicular modification, telecommunications, sensory, and other technological aids and devices.

12. Transition services for students with disabilities to facilitate the achievement of the employment outcome identified in the IPE.

13. Supported employment.

14. Services to the family to assist an individual with a disability to achieve an

employment outcome.

15. Post-employment services necessary to assist an individual to retain, regain or advance in employment.

29 U.S.C. § 723(a); 34 C.F.R. § 361.48(a).

B. Assistive Technology

The Rehabilitation Act uses the definitions of AT devices and services contained in the Technology-Related Assistance for Individuals with Disabilities Act of 1988 (Tech Act)(P.L. 100-407, 102 Stat. 1044, 29 U.S.C. §§ 2201 *et seq.*). *Id.* § 705(3) and (4).

> The term "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.

Id. § 2202(2).

> The term "assistive technology service" means any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes–
>
> (A) the evaluation of the needs of an individual with a disability, including a functional evaluation of the individual in the individual's customary environment;
>
> (B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by individuals with disabilities;
>
> (C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices;
>
> (D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
>
> (E) training or technical assistance for an individual with disabilities, or, where appropriate, the family members, guardians, advocates, or authorized representatives of such an individual; and
>
> (F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide

> services to, employ, or are otherwise substantially involved in the major life functions of individuals with disabilities.

Id. § 2202(3).

The legislative history to the Tech Act indicates the broad range of AT devices that were contemplated:

> The Committee includes this broad definition to provide maximum flexibility to enable States to address the varying needs of individuals of all ages with all categories of disabilities and to make it clear that simple adaptations to equipment are included under the definition as are low and high technology items and software.

Senate Report No. 100-438, 1988 U.S. Code Cong. & Admin. News, p. 1405.

The availability of AT devices and services are expressly included in the definition of "rehabilitation technology" in Title I of the Rehabilitation Act. Rehabilitation technology is defined as:

> [T]he systematic application of technologies, engineering methodologies, or scientific principles to meet the needs of and address the barriers confronted by individuals with disabilities in areas which include education, rehabilitation, employment, transportation, independent living, and recreation. The term includes rehabilitation engineering, assistive technology devices, and assistive technology services.

29 U.S.C. § 705(30).

The rehabilitation technology services envisioned by Title I of the Rehabilitation Act can take many forms and are in no way limited by the Act. The State VR Plan must describe the "manner in which the broad range of rehabilitation technology services will be provided," including training and the provision of AT. 34 C.F.R. § 361.48(b)(emphasis added).

The use of AT to assist in preparing individuals with disabilities for employment permeates the VR process. As noted above, the assessments to determine eligibility and rehabilitation needs may include an assessment by someone skilled in rehabilitation technology. 29 U.S.C. §§ 705(2)(C) and 723(a)(1). Available VR services which may meet the definition of AT include:

1. Prosthetic and orthotic devices;

2. Eyeglasses;

3. Orientation and mobility services, which can include AT;

4. Rehabilitation technology services, which can include vehicular modifications [34 C.F.R. § 361.5(b)(49), Note];

5. Telecommunications;

6. Sensory devices; and

7. Other technological aids and devices.

29 U.S.C. § 723(a). Any such service must be listed on the IPE. *Id.*

Several examples of AT can be gleaned from the court decisions. For example, in *Chirico v. Office of Voc. and Educ. Services*, 211 A.D.2d 258, 627 N.Y.S.2d 815 (N.Y. App. Div. 3rd Dept. 1995), the court approved funding for a voice-activated computer for job-related paperwork at home to enable the individual to advance in his employment. In *Brooks v. Office of Vocational Rehabilitation*, 682 A.2d 850 (Pa. Cmwlth. Ct. 1996), the VR agency agreed to provide an individual with Multiple Chemical Sensitivities funding for: "1) full dental filling replacements; 2) a sauna for her home to allow her to 'detoxify'; 3) a computer, modem, and software packages; and 4) typing services." *Id.* at 851. The court denied her request for chiropractic services, however, finding that the individual did not demonstrate that it would benefit her.

As with any other VR service, the standard for obtaining AT is whether it is "necessary to assist an individual with a disability in preparing, securing, retaining, or regaining an employment outcome." 29 U.S.C. § 723(a). For example, in *Zingher v. Dept. of Aging and Disabilities*, 163 Vt. 566, 664 A.2d 256 (Vt. S.Ct. 1995), the court agreed with the VR agency that it was appropriate to wait until petitioner had a job before purchasing compensatory computer hardware and software. The petitioner had a degree in accounting and had learning, emotional and physical disabilities. A computer expert, hired by the VR agency, recommended that compensatory computer hardware and software should not be purchased until the petitioner had a job so that the compensatory equipment could be tailored to the job site and the actual equipment being used by the employer. The court agreed. Moreover, the court noted that the comprehensive accounting system sought by the petitioner would be consistent with a goal of self-employment. However, the petitioner's goal had never been self-employment. The court also noted that once petitioner obtained a job, any equipment necessary for him to do the job must be provided promptly by the VR agency, because "any delay in obtaining equipment necessary for petitioner to do the job will jeopardize a position he succeeds in securing." *Id.*, 664 A.2d at 260.

C. Post-Employment Services

Post-employment services are defined as services provided after the person has achieved an employment outcome, which are necessary for the individual "to maintain, regain or advance in employment." 34 C.F.R. § 361.5(b)(37)(emphasis added). A note to the regulation indicates some possible circumstances in which post-employment services may be appropriate:

> Post-employment services are available to assist an individual to maintain employment, e.g., the individual's employment is jeopardized because of conflicts with supervisors or co-workers and the individual needs mental health services and counseling to maintain the employment; to regain employment, e.g., the individual's job is eliminated through reorganization and new placement services are needed; and to advance in employment, e.g., the employment is no longer consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, and interests.

Id., Note.

Each IPE must indicate the expected need for post-employment services. Prior to a decision that an individual has achieved an employment outcome, there must be a reassessment of the need for post-employment services. *Id.* § 361.46(c). If there will be a need for post-employment services, they are to be provided under an amended IPE. Therefore, there is no need for a re-determination of eligibility. *Id* § 361.5(b)(37). A note indicates that post-employment services are not intended to be complex or comprehensive and should be limited in scope and duration. If more comprehensive services are required, a new rehabilitation effort should be considered. *Id.*, Note.

In *Chirico v. Office of Voc. and Educ. Services*, 211 A.D.2d 258, 627 N.Y.S.2d 815 (N.Y. App. Div. 3rd Dept. 1995), the individual sought funding for a voice-activated computer for job-related paper work at home to enable him to advance in his employment. The court rejected the VR agency's "implicit view that they can best determine the bounds of petitioner's potential and judgement that petitioner's present position (attained before he was 40) is all he should ever expect to achieve." *Id.*, 211 A.D. 2d at 261.

D. Out-of-State Services

What if a VR consumer needs to attend a program out-of-state because there is no program within the state to prepare the individual for the agreed upon employment goal? What if there is a program within the state, but, for personal reasons, the individual prefers to attend the out-of-state program? May the VR agency refuse to fund the program? The regulations provide some guidance.

A state cannot establish policies that "effectively prohibit the provision of out-of-state services." *Id.* § 361.50(a)(2). However, a state "may establish a preference for in-state services," as long as there are exceptions to ensure that an individual is not denied a necessary service. *Id.* § 361.50(a)(1). Therefore, if there is no program within the state that will enable the individual to meet the employment goal, the state must have a process to fully fund the out-of-state program (subject to any financial need criteria the state may have established).

On the other hand, if the out-of-state program costs more than an in-state service, and either service would meet the individual's rehabilitation needs, the VR system is not responsible for costs in excess of the cost of the in-state service. The individual must still be able to choose an out-of-state

service, and the VR system would be responsible for the costs of the out-of-state program, up to the cost of the in-state program. *Id.*

V. Financial Need Criteria

There is no requirement that a state consider financial need when providing VR services. *Id.* § 361.54(a). However, if a state VR agency chooses to establish a financial needs test, it must establish written policies which govern the determination of financial need and which identify the specific VR services that will be subject to the financial needs test. *Id.* § 361.54(b)(2).

Any financial needs test must take into account the individual's disability-related expenses. *Id.* § 361.54(b)(2)(v)(B). The level of the individual's participation must not be so high as to "effectively deny the individual a necessary service." *Id.* § 362.54(b)(2)(v)(C). The following services must be provided without regard to financial need: (1) diagnostic services; (2) counseling, guidance and referral services; and (3) job placement. *Id.* § 361.54(b)(3).

VI. Maximization of Employment

A. Pre-1986 Standard

When the Rehabilitation Act was first passed in 1973, the preamble to the entire Act, not just Title I (which addresses VR services), included the following as the stated purpose:

> [T]o develop and implement comprehensive and continuing state plans for meeting the current and future needs for providing [VR] services to handicapped individuals ... so that they may prepare for and engage in gainful employment.

Former 29 U.S.C. § 701(1).

There was a separate section stating that the purpose of Title I of the Act was to:

> [A]ssist States to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities.

Former 29 U.S.C. § 720(a)(emphasis added).

In *Cook v. PA Bureau of Vocational Rehabilitation*, 45 Pa.Cmwlth. 415, 405 A.2d 1000 (Pa. Cmwlth. Ct. 1979), the court noted that the above-quoted statutory language did not equate to being employed at "any job." The employment goal had to be consistent with the individual's abilities. The petitioner had a bachelor's degree and conceded that he could "get a job," but sought VR funding for law school. The court did not make a final decision, however, and remanded the case for further proceedings because the record was incomplete.

B. The Post-1986 Maximization Requirements

The requirement that VR services are to be designed to maximize the employment of VR consumers was first added by 1986 amendments. As first stated in 1986, the standard was "to develop and implement ... comprehensive and coordinated programs of VR ... to maximize ... employability, independence, and integration into the workplace and the community." Pub. L. 99-506, § 101, 100 Stat. 1808(emphasis added). This language was added to the preamble covering the entire Act, not just Title I.

The legislative history emphasized Congressional intent:

> [T]he overall purpose of the Act is to develop and implement comprehensive and coordinated programs of rehabilitation for handicapped individuals which will maximize their employability, independence and integration into the work place and the community. The Committee views [the Act] as a comprehensive set of programs designed to meet the broad range of needs of individuals with handicaps in becoming integrated into the community and in reaching their highest level of achievement.

S. Rep. No. 388, 99th Cong., 2d Sess. 5 (1986)(emphasis added), as quoted in *Polkabla v. Commission for the Blind*, 183 A.D.2d 575, 576, 583 N.Y.S.2d 464, 465 (N.Y. App. Div.1st Dept. 1992).

As currently stated in the preamble, the purpose of the Rehabilitation Act is to:

> [E]mpower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through ... comprehensive and coordinated state-of-the-art programs of vocational rehabilitation.

29 U.S.C. § 701(b)(1)(A)(emphasis added).

This current statutory language, which was added in 1992, strengthens the standard, as it now requires the VR agency to maximize an individual's economic self-sufficiency. Presumably, this means that if an individual with a disability has the requisite ability, and has the option of either obtaining a bachelor's degree and becoming a paralegal or going to law school to become an attorney, the VR system should approve the goal of becoming an attorney, because the attorney position would more likely "maximize economic self-sufficiency." However, to date, the courts which have addressed the issue have not picked up on this new requirement to maximize economic self-sufficiency.

Similar to, but stronger than, the standard announced when the Rehabilitation Act was first enacted, the purpose of Title I of the Act is to assist states in operating effective VR systems designed to:

> [P]rovide [VR] services for individuals with disabilities, consistent with their strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, so that such individuals may prepare for and engage in gainful employment.

29 U.S.C. § 720(a)(2)(B)(emphasis added).

In keeping with the dual obligations of the VR system to maximize employment and ensure that the employment goal is consistent with a person's interests and capabilities, post-employment services are available to assist an individual to advance in employment. 34 C.F.R. § 361.5(b)(37). As noted above, this obligation applies when "the employment is no longer consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, and interests." *Id.*, Note. This requirement can have no meaning if the obligation of the VR agency ceases when an individual merely becomes employed full-time.

Therefore, whatever can be said about the requirement to "maximize employment," the obligations placed on the VR system are no less than as stated by the court in *Cook*: the VR system has not met its responsibility when an individual is capable of being employed at "any job."

C. Rehabilitation Services Administration Policy Directive

Consistent with the increased statutory obligations placed on state VR agencies, on August 19, 1997, the federal Rehabilitation Services Administration (RSA) issued a Policy Directive, RSA-PD-97-04. This directive requires state VR agencies to approve vocational goals and the services to meet these goals to enable persons with disabilities to maximize their employment potential. It represents a dramatic shift in RSA policy.

The August 1997 Policy Directive concerns the "employment goal" for an individual with a disability. It rescinds a 1980 policy and describes the standard for determining an employment goal under Title I. RSA's 1980 policy, 1505-PQ-100-A, identified "suitable employment" as the standard for determining an appropriate vocational goal for an individual with a disability. In that policy and in an earlier, 1978 policy (1505-PQ-100), RSA described "suitable employment" as "reasonable good entry level work an individual can satisfactorily perform."

The 1997 policy was, in part, a response to the fact that many state VR agencies would not approve the training and other services needed to allow a person to maximize employment potential. RSA's clear change in policy is best expressed in the following quote from the August 1997 Policy Directive:

> The guidance provided through this Policy Directive is intended to correct the misperception that achievement of an employment goal under Title I of the Act can be equated with becoming employed at any job. As indicated above, the State VR Services program is not intended solely to place individuals with disabilities in entry-level jobs, but rather to assist eligible individuals to obtain employment that is

> appropriate given their unique strengths, resources, priorities, concerns, abilities, and capabilities. The extent to which State units should assist eligible individuals to advance in their careers through the provision of VR services depends upon whether the individual has achieved employment that is consistent with this standard (emphasis added).

This directive clarifies that cost or the extent of VR services an individual may need to achieve a particular employment goal should not be considered in identifying the goal in the IPE. The new directive also clarifies that a person who is currently employed will, in appropriate cases, be eligible for VR services to allow for "career advancement" or "upward mobility."

The Policy Directive emphasizes that the state VR agency must still determine whether the individual's career choice is consistent with his or her vocational aptitude. In an effort to meet the maximization of employment requirements, however, state agencies are encouraged to make these determinations through a comprehensive assessment (such as a trial placement in a real work setting) or by establishing short-term objectives in the IPE (such as a trial semester in college). In many cases, these trial work or educational placements should be accompanied by the availability of AT as a means of overcoming a disability-related deficit.

D. Court Decisions

What have the courts had to say about the obligations of the VR system? Several courts have applied the maximization standard to fund VR services which a VR agency had initially denied. However, as time has gone on, the decisions have become decidedly more mixed.

In *Buchanan v. Ives*, 793 F.Supp. 361 (D. Me. 1991), the parties agreed that applying a "cost efficiency analysis" to the determination of an individual's goals and needs would violate the Act. The court held that a "cost efficiency analysis" cannot be the major determinant to deny funding of services. The court noted that the intent of Congress, in adding the maximization language, was:

> [T]o establish a program which would provide services to assist clients in achieving their highest level of achievement or a goal which is consistent with their maximum capacities and abilities. *Id.* at 365.

Accordingly, the court ruled that the goal of "maximizing employability" cannot be equated with the ability to do any job. It held that Title I requires a highly individualized analysis of the individual's goals and, within reason (considering the economy and market potential), services to enable the client to reach the highest possible level of achievement.

In *Indiana Dept. of Human Services v. Firth*, 590 N.E.2d 154 (Ind. Ct. of App., First Dist. 1992), the issue was the individual's eligibility for VR services while attending law school. He did not apply for VR services until after he started attending law school. The VR agency found the person's deafness was not a substantial impediment to employment, as he had the present capacity

to work as a writer.

On appeal, the court ruled for the plaintiff and held that in interpreting "capacities and abilities" the Act requires an analysis of potential, not current capabilities, particularly in light of the maximization requirement. Notwithstanding the individual's present writing abilities, the court cited the need for VR-funded interpreter services for him to become a lawyer.

In *Polkabla v. Commission for the Blind*, 183 A.D.2d 575, 583 N.Y.S. 2d 464 (N.Y. App. Div. 1st Dept. 1992), the court held that Title I requires services to enable a blind paralegal to reach the highest achievable vocational goal, college and law school, and not merely "suitable employment." The fact that the individual initially requested and was approved for paralegal training was not considered relevant to the current issue of her goal to become a lawyer. It should be noted that the IPE may be amended to change the employment goal. 29 U.S.C. § 722(b)(2)(E).

In *Stevenson v. Dept. of Labor and Industry*, 167 Pa.Cmwlth. 394, 648 A.2d 344 (Pa. Cmwlth. Ct. 1994), the court upheld the VR agency's denial of funding for a master's degree. The VR agency had funded the individual's bachelor's degree in accounting and she sought funding for an MBA program. The VR agency believed that the federal VR laws did not give it the authority to fund the master's level degree. The court agreed, but relied on the old RSA policy memorandum which was overturned by the 1997 RSA Policy Directive referred to above. However, at the time of the decision, the 1986 maximization standard referred to above was in effect. Nevertheless, the court made the following observation:

> It would be unreasonable and impractical to require that the "highest level of education achievable" be granted in every case of providing an individual with rehabilitation services. Rather, the goal of attaining suitable employment is a highly individualized determination which is to be made on a case-by-case basis.

Id., 648 A.2d 347.

In *Chirico v. Office of Voc. and Educ. Services*, 211 A.D.2d 258, 627 N.Y.S.2d 815 (N.Y. App. Div. 3rd Dept. 1995), the individual sought funding for a voice-activated computer for job-related paperwork at home to enable him to reach his highest level of achievement. The court held that attainment of a position as a guidance counselor by working two to four extra hours per day at home, six days a week, was not his full potential. The court noted that without the requested AT, the individual's ability to consider advancement was severely compromised.

In *Romano v. Office of Voc. and Educ. Services*, 223 A.D.2d 829, 636 N.Y.S.2d 179 (N.Y. App. Div. 3rd Dept. 1996), the court held that funding for a Masters in Social Work degree, prior to entry into the plaintiff's chosen profession, was not required to enable the individual to reach the agreed upon goal of social work in therapeutic counseling. The court specifically reasoned:

> In providing the empowerment necessary for petitioner to ultimately achieve

> maximum employment as generally provided for by the stated purpose of the Rehabilitation Act, there is no requirement that [the state VR agency] sponsor every possible credential desired by petitioner.

Id., 223 A.D.2d at 830. The court also pointed out that the individual's disability did not preclude advancement in her chosen profession. Therefore, according to the court, the achievement of her IPE goal empowered her to ultimately reach higher levels.

In *Murphy v. Voc. and Educ. Services*, 92 N.Y.2d 477, 683 N.Y.S.2d 139 (N.Y. Ct. of Appeals 1998), New York's highest court declined to order the state's VR agency to fund law school education because the individual "has been assisted in gaining access to employment in the agreed-upon field of legal services, to the point of being employable competitively with nondisabled persons." *Id.*, 92 N.Y.2d at 487. The court stated that the maximization standard is met when "the recipient is aided to the point, level and degree that allows the opportunity for personal attainment of maximum employment." *Id.* at 481 (emphasis added). The "goal is to empower eligible individuals with the opportunity to access their maximum employment, not to provide individuals with idealized personal preferences for actual optimal employment." *Id.* In reaching this decision, however, the court does not discuss the 1997 RSA Policy Directive, referred to above.

In *Berg v. Florida Department of Labor*, 163 F.3d 1251 (11th Cir. 1998), the court ruled against the plaintiff. The primary focus of the case was whether Florida's VR agency discriminated on the basis of disability, in violation of Section 504 of the Rehabilitation Act of 1973, when denying funding for law school. However, the court also looked at the maximization language in Title I of the Rehabilitation Act. The court stated that "the purpose of 'maximiz[ing] employment' does not refer to obtaining some sort of premium employment." *Id.* at 1256. The court's decision does not refer to the 1997 RSA Policy Directive and, in looking at the Act's stated purposes, ignores the requirement that "meaningful" employment be consistent with the client's abilities and capabilities.

When looking at the cases which have declined to follow the individual's request for further VR assistance, a few things stand out. First, a number of the courts criticized the individual for either starting the program before seeking VR assistance or for seeking to amend the VR plan to obtain more services than initially requested. The courts which approved an individual's request for additional services did not seem bothered by this conduct.

Second, the courts seemed reluctant to give the maximization language its full effect. For example, the court in *Stevenson* called it "unreasonable and impractical" to fund the highest level of achievement for which an individual was capable. The courts seem to read into the VR laws a requirement to conserve resources by limiting services, rather than pushing for a move to an Order of Selection, which is how the VR laws are meant to deal with insufficient resources to fully meet the needs of all eligible individuals.

Third, none of the decisions declining additional services discuss the 1997 RSA Policy Directive and none of them have considered the revolution in informed choice created by Rehab '98.

A fair reading of these requirements is that the individual's choice of an employment goal, while not without any review by the VR agency, should be approved if it is within the client's capability and it is likely to lead to a successful employment outcome. This is what the court in *Buchanan* referred to as consideration of the economy and market potential. In other words, the VR agency should approve the goal if it is one which the individual is capable of achieving and is one which is likely to lead to employment. The availability of resources should not be part of the analysis. We will have to wait to see if the courts will give full effect to the VR laws as currently written or will continue to hesitate to approve funding for advanced degrees.

VII. Comparable Services Requirement

A. Basic Requirements

VR agencies are considered the payer of last resort for many services. This means they will not pay for a service if a similar benefit is available through some other agency or program. 29 U.S.C. § 721(a)(8). For example, if an applicant qualifies for personal assistance services through Medicaid, the VR agency will not provide those services. By contrast, the VR agency cannot deny payment for college tuition because an individual could obtain student loans. Student loans, which must be repaid, are not similar benefits. RSA Policy Directive, RSA-PD-92-02 (11/21/91). Additionally, comparable benefits do not include awards and scholarships based on merit. 29 U.S.C. § 721(a)(8)(A)(ii).

A person does not have to exhaust similar benefits in the following circumstances:

1. If consideration of the similar benefit would interrupt or delay:
   a. The progress of an individual toward achieving the employment outcome;
   b. An immediate job placement; or
   c. Services to an individual at extreme medical risk; or
2. If diagnostic services, VR counseling, referral to other services, job placement or rehabilitation technology (*i.e.*, AT) is involved.

Id. § 721(a)(8)(A)(i); 34 C.F.R. § 361.54(b) and (c).

What if a potential funding source, such as Medicaid, is refusing to pay for an augmentative communication device (ACD), which is needed for the person to meet the employment objective and the person cannot proceed while waiting for the device? Rehab '98 attempts to give practical guidance on how the VR agency is to proceed. States must develop a comprehensive plan involving all of the public agencies providing what could be considered VR services, including the state's

Medicaid agency, public colleges and the workforce investment system, to identify who will be responsible for providing what services. 29 U.S.C. § 721(a)(8)(B).

The plan must ensure the coordination and timely delivery of services. All public agencies in the state remain responsible for providing services mandated by other state laws or policy, or federal laws. If another agency refuses to fulfill its obligations, the VR agency must provide the services, but may seek reimbursement from that agency. *Id.* § 721(a)(8)(C)(ii). Additionally, the IPE must now list all services to be provided to meet the employment goal, whether or not they are the responsibility of the VR agency. It must then identify the services the VR agency is responsible for providing, any comparable benefits the individual is responsible for applying for or securing, and the responsibilities of any agencies to provide comparable benefits. *Id.* § 722(b)(3)(E).

Therefore, the bottom line is, if another agency is refusing to provide a service that is within its area of responsibility, the individual does not have to wait until that dispute is resolved before obtaining the service. In the above example, the IPE would list an ACD as a service to be provided and indicate that it would be provided by Medicaid, as a comparable benefit. If Medicaid then refused to provide the ACD, the VR agency would be responsible for obtaining the device, pending resolution with Medicaid.

B. Defaulted Student Loans

Many individuals with disabilities may have attempted college either before or after they became disabled. If prior college attempts were unsuccessful, the student may have defaulted on student loans. When the loans are secured by the federal government, the individual will not be eligible for further financial assistance, such as grants, for college until the prior loans are no longer in default. What if the individual now seeks to return to college, with VR support, and does not have the financial ability to get the loan out of default? Must the VR agency consider, as a comparable benefit, the value of any grants for which the individual would have been eligible, and reduce its support to the individual by that amount?

1. Effect of Defaulted Student Loans on VR Funding for College

VR agencies may fund higher education, if needed to meet an employment goal. However, the VR agency cannot use Title I funds "unless maximum efforts have been made to secure grant assistance, in whole or in part, from other sources to pay for such" higher education. *Id.* § 723(a)(3); 34 C.F.R. § 361.48(a)(6)(emphasis added). The RSA has issued a Policy Directive to reconcile the requirement to use "maximum efforts" to secure outside grant assistance and the problem for individuals with defaulted student loans, where that assistance is unavailable. RSA Policy Directive, RSA-PD-92-02 (11/21/91).

RSA's Policy Directive provides that if an individual with the financial means to do so fails to repay a loan, the VR agency may determine that the financial assistance for which the student is ineligible is, in any event, "available" to that person. Accordingly, the VR agency would deduct from

the amount of assistance it will provide the value of the grants for which the student would have been eligible. On the other hand, when a student with limited financial means cannot make repayment arrangements with the lender, the VR agency may conclude that "maximum efforts" have been made and full VR assistance would be appropriate. When confronted with this question, VR counselors must make individualized determinations, based on all of the circumstances involved. *Id.*

2. Forgiveness of Student Loans

Under the federal guaranteed student loan program, there are provisions for discharging a student loan, if a person becomes "totally and permanently disabled." 20 U.S.C. § 1087(a). To be considered "totally and permanently disabled," the individual must be "unable to work and earn money or attend school because of an injury or illness that is expected to continue indefinitely or result in death." 34 C.F.R. §§ 685.102(a)(3) and 682.200.

Upon receipt of "acceptable documentation" that the borrower has become totally and permanently disabled, the U.S. Department of Education will discharge the obligation of the borrower, and any endorser, to make any further payments on the loan. *Id.* § 685.212(b)(1). A loan will not be discharged if the condition existed at the time the individual applied for the loan, unless the condition "substantially deteriorated" after the loan was made which resulted in the individual becoming totally and permanently disabled. *Id.* § 685.212(b)(2).

Under prior regulations, if an individual who had a loan discharged because of disability applied for a subsequent loan, the individual had to agree to repay the prior loan which had been discharged. Federal Register, pp. 60327-60328, 12/12/92. This provision has been eliminated. However, the individual must obtain a certificate from a doctor that he or she is now able to engage in "substantial gainful activity." 34 C.F.R. § 682.201(a)(5)(i)(A). In other words, the individual must certify that his or her impairment is not so severe as to qualify the person for SSDI or SSI. The individual must also sign a statement that the new loan cannot be canceled in the future based on any impairment present at the time the loan was made, unless the impairment "substantially deteriorates." *Id.* § 682.201(a)(5)(i)(B).

3. Repayment of Defaulted Student Loans

If an individual with a disability is not eligible to have a student loan forgiven, the law makes it relatively easy to develop a repayment plan which will take the loan out of default. Each guaranty agency under the federal student loan program must establish a program which allows a borrower with defaulted loans to renew eligibility for all federal financial assistance. The borrower must make six consecutive monthly payments. The guaranty agency cannot demand from a borrower a monthly payment amount that is "more than is reasonable and affordable based upon the borrower's total financial circumstances." A borrower may only obtain the benefit of this provision once. 20 U.S.C. § 1078-6(b)(emphasis added).

The payments must be voluntary and on-time. "On-time" means payments are made within

15 days of the scheduled due date. "Voluntary payments" "do not include payments obtained by income tax offset, garnishment, or income or asset execution." 34 C.F.R. § 685.102(b).

VIII. Purchase of AT for Special Education Students in Transition: Who Pays?

What responsibility does a VR agency have to an individual with a disability who is still in school? Many VR agencies are unwilling to get involved with students until their right to an appropriate special education is over, citing the comparable benefits requirement. Where AT is involved, this can be a significant problem. Schools do not normally consider AT devices purchased to ensure an appropriate education to be the student's property. *See* Federal Register, p. 12540, 3/12/99 (comments to the 1999 federal special education regulations). If the AT device will also be essential for college or employment, significant delays will result if the VR process does not begin until after a student leaves school. It also makes little fiscal sense for a school to provide AT, merely to be surrendered upon graduation with the student then seeking another device from the VR agency.

May the VR agency simply refuse to get involved until the student graduates or ages out of the school system? To attempt to answer this question, we will first look at what the school system's responsibilities are under the special education laws. We will then look at the VR system's responsibilities, and, finally, we will examine how the two systems interact with each other.

A. Transition Services under the Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*, requires that no later than age 14 school districts include in each student's individualized education program (IEP) a transition plan to aid in the student's move to adult life. 34 C.F.R. § 300.347(b). Beginning at age 14, the IEP must include the transition service needs related to the child's course of study in school, such as "participation in advanced-placement courses or a vocational education program." 20 U.S.C. § 1414(d)(1)(A)(vii)(I). Beginning at 16, or younger if appropriate, actual transition services are to begin, including identifying the responsibilities of agencies other than the schools to provide services. *Id.* § 1414(d)(1)(A)(vii)(II).

Transition services are defined as a coordinated set of activities for a student, designed within an outcome-oriented process, that promotes movement from school to post-school activities. The areas of adult living to be considered include preparation for postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, and community participation. *Id.* § 1401(30).

Services are to be based on the individual student's needs, taking into account the student's preferences and interests. The specific services to be offered include: (1) instruction, (2) related services, (3) community experiences, (4) development of employment and other post-school adult living objectives, and (5) if appropriate, acquisition of daily living skills and a functional vocational evaluation. *Id.* As part of the transition plan, schools must identify appropriate adult service providers and foster linkages with those agencies. 34 C.F.R. § 300.347(b)(2). The schools are

expected to become familiar with "the post-school opportunities and services available for students with disabilities in their communities." House Report No. 101-544, 1990 U.S. Code Cong. & Admin. News p. 1733.

If an IEP meeting is to consider transition services for a student, the school must invite the student and a representative of any other agency that is likely to be responsible for providing or paying for transition services. If the student does not attend, the school must take other steps to ensure that the student's preferences and interests are considered. If an invited representative does not attend, the school must take other steps to obtain the participation of that agency in the planning of any transition services. 34 C.F.R. § 300.344(b).

It is clear that when transition planning was added to IDEA in 1990, VR agencies, and other public agencies with responsibilities for students, were intended to be involved both in the planning process with schools and in the actual provision of services. The legislative history states that the statement of needed transition services "should include a commitment by any participating agency (i.e., the State or local rehabilitation agency)" to meet any financial responsibility it may have in the provision of transition services. House Report No. 101-544, p. 11, 1990 U.S. Code Cong. & Admin. News, p. 1733 (emphasis added).

VR agencies are also specifically referred to in the IDEA regulations. The definition of rehabilitation counseling includes services provided by the VR agency. 34 C.F.R. § 300.24(b)(11). The IDEA definition of AT services includes coordinating other services with AT devices "such as those associated with existing education and rehabilitation plans and programs." 20 U.S.C. § 1401(2)(D)(emphasis added). The IDEA regulations also note that nothing in the transition services requirements relieves any participating agency, "including a State [VR] agency," of the responsibility to provide or pay for any transition service that the agency would otherwise provide. 34 C.F.R. § 300.348(b).

Amendments to IDEA in 1997 strengthened the obligations of other public agencies to provide services to students while they are still in school. All states must now have interagency agreements to ensure that all public agencies responsible for providing services that are also considered special education services, fulfill their responsibilities. The financial responsibility of these public agencies must precede that of the school. If an agency does not fulfill its obligation, the school must provide the needed services, but has the right to seek reimbursement from the public agency. The agreement must also specify how the various agencies will cooperate to ensure the timely and appropriate delivery of services to the students. 20 U.S.C. § 1412(a)(12).

B. Transition Obligations Under the Rehabilitation Act

During the same time that changes were being made to IDEA, there were also changes being made to the VR laws concerning the role of VR agencies in the transition process. Based on 1992 changes to the VR laws, the VR regulations now require the State VR Plan to develop policies to facilitate a student's transition from the special education system to the VR system. The VR

regulations contemplate the development of an IPE by the VR system, for students eligible for VR services, before the student leaves the school setting. 34 C.F.R. § 361.22(a)(1).

However, the legislative history to the 1992 VR laws states that schools remain responsible for ensuring a free appropriate public education to students during the transition years. S. Rep. No. 357, 102d Cong., 2d. Sess., 33 (1992), as quoted at 34 C.F.R. § 361.22, Note. This seems to contradict the requirements of IDEA, discussed above. However, the VR law's intent is to ensure that "there is no gap in services between the education system and the vocational rehabilitation system." *Id.*

The laws governing VR agencies were again amended in 1998. Among other changes, the law more clearly identifies the responsibilities of the VR system to special education students, and, hopefully, removes the apparent contradiction. The State VR Plan must now include procedures to facilitate the transition of students with disabilities from the special education system to the VR system, including: (1) consultation and assistance to the educational agencies in preparing the transition plan in the special education IEP; and (2) defining the relative roles and financial responsibilities of the special education and VR systems to provide services. 29 U.S.C. § 721(a)(11)(D). As noted above, available VR services now also include funding transition services to students with disabilities to facilitate an employment outcome, when appropriate. *Id.* § 723(a)(15).

Subject to the State VR Plan, the VR agency is required to provide services to special education students to facilitate achievement of the employment outcome as spelled out in the IPE. Congressional Record–House, H6693, July 29, 1998. "However, State [VR] agencies should not interpret the 'interagency agreement' provisions as shifting the obligation for paying for specific transition services normally provided by those agencies to local school districts. State [VR] agencies still have that responsibility." *Id.*

C. Reading the Special Education and VR Laws Together

What is the effect of all of these requirements for the student who needs an AT device? First, the VR agency may participate in the transition planning meetings with the school. Second, if the graduating student clearly will need the AT device to prepare for employment, a reasonable approach would be to have the VR agency purchase the device in the first instance or purchase it from the school when the student graduates. The need for the device would continue to be reflected in the special education IEP, with reference to the VR agency as payer (or purchaser) of the existing device upon the student's graduation. The AT device would also appear in the IPE, which must be developed by the VR agency before the child finishes school.

Nothing prohibits the VR agency from purchasing the AT outright for the student while still in special education or from purchasing it from the school when the student graduates. The IDEA regulations envision other agencies providing services to students in transition, including VR agencies. 34 C.F.R. § 300.348. The VR regulations require that the State VR Plan specify the financial responsibility of the various state agencies serving the student. *Id.* § 361.22(a)(2)(v).

IX. AT for the College Student: Who Pays?

A similar problem arises when a VR agency refuses to provide services for a college student, arguing that the college's responsibility under the Americans with Disabilities Act (ADA) or Section 504 is a comparable benefit. *See* "Several Vocational Agencies Stop Paying For Auxiliary Aids," *Section 504 Compliance Handbook*, Supp. No. 213, p. 1 (Thompson Publishing Group, August 1996).

A. Obligations of Colleges and Universities

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in any program or activity receiving federal funds. 29 U.S.C. § 794. Since virtually every college and university in the country receives federal funds, they are bound to comply with the terms of the law. Ironically, Section 504 comes from the same law, the Rehabilitation Act of 1973, which covers VR services.

The ADA prohibits discrimination on the basis of disability whether or not a covered entity receives federal funds. Title II of the ADA covers programs operated by state and local governments. Public colleges and universities are covered by Title II. 42 U.S.C. § 12131. Title III of the ADA covers private entities which are considered places of public accommodation. Private colleges and universities are specifically included in the list of examples of places of public accommodation. *Id.* § 12181(7)(J). Therefore, all colleges and universities in the country will be covered by either Section 504, the ADA, or both.

There are regulations under Section 504 which specifically deal with colleges and universities. The ADA does not have a similar set of requirements. However, the requirements of the ADA will be virtually identical to those under Section 504. Therefore, this booklet will briefly review the Section 504 regulations. We will then discuss how the responsibilities of colleges interact with the responsibilities of the VR system.

The regulations under Section 504 set out a general standard for colleges and universities. No qualified student with a disability shall, on the basis of disability, "be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination." 34 C.F.R. §§ 104.42 and 104.43(a). Colleges and universities are also required to operate their programs and activities in the most integrated setting appropriate. *Id.* § 104.43(d).

Colleges must make modifications to their academic requirements, such as modifying the length of time to complete a degree, substituting courses, and adapting the manner in which courses are conducted. There is an exception to the obligation to modify course requirements if the college can show that the academic requirement is essential to the student's program of instruction or to a directly related licensing requirement. *Id.* § 104.44(a).

All course examinations or other procedures for evaluating student performance must be

modified so that they measure the student's achievement rather than the effects of the disability. *Id.* § 104.44(c). Additionally, colleges cannot impose rules, such as prohibiting tape recorders or service dogs, which limit the participation of people with disabilities in the program. *Id.* § 104.44(b).

Colleges must provide auxiliary aids to enable students with impaired sensory, manual or speaking skills to participate in the program. The requirement to provide auxiliary aids is the broadest statement of the obligation for colleges and universities to provide AT. Auxiliary aids can include taped texts, interpreters, readers in libraries, adapted classroom equipment and other similar services and actions. Personal services (including readers for personal study) or individually prescribed devices are not included. *Id.* § 104.44(d).

B. Obligations of the Vocational Rehabilitation System

The U.S. Department of Education enforces both Title I of the Rehabilitation Act, governing VR agencies, and Title V, which includes Section 504. In fact, the Education Department wrote both the regulations covering VR agencies and those covering Section 504.

The regulatory history to the Section 504 regulations governing colleges indicates the role the Department of Education envisioned for colleges in providing auxiliary aids. The Department stressed that colleges could normally meet their obligation:

> [B]y assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities.

Id. Part 104, App. A, note 31 (emphasis added). The purpose of these comments was to highlight that the provision of auxiliary aids would not be an undue burden on the colleges. *See U.S. v. Board of Trustees for U. of Ala.*, 908 F.2d 740, 745 (11th Cir. 1990).

Addressing this question relative to Section 504, the Seventh Circuit, in *Jones v. Illinois Dept. of Rehabilitation Services*, 689 F.2d 724 (7th Cir. 1982), held that the state VR agency has the primary responsibility to provide auxiliary aids in the form of interpreter services. In *dicta*, the court also noted its approval of the district court's opinion that the similar benefits requirement did not even apply to colleges or universities. *Id.* at note 7. Likewise, in *Schornstein v. N.J. Div. of Voc. Rehab.*, 519 F.Supp. 773 (D.N.J. 1981), *aff'd*, 688 F.2d 824 (3rd Cir. 1982), the court held that the VR agency's policy of refusing to provide interpreter services to college students violated Title I of the Rehabilitation Act.

Rehab '98 clarifies, to some extent, the relative responsibilities of colleges and VR agencies in these situations. As noted above, the IPE not only is supposed to list the services that the VR agency will be providing, but also those services which will be provided by other agencies as comparable benefits. 29 U.S.C. § 722(b)(3)(E). This way everyone will know, in advance, who is

responsible for what services.

Additionally, public colleges and universities must be included in developing a comprehensive plan to ensure the coordination and timely delivery of services. *Id.* § 721(a)(8)(C)(emphasis added). They remain responsible for providing services mandated by other state laws or policy, or federal laws, such as the ADA and Section 504. *Id.* § 721(a)(8)(C)(i). If they refuse to provide services, the VR agency must provide the services, but may seek reimbursement from the college or university. *Id.* § 721(a)(8)(C)(ii). "However, State [VR] agencies should not interpret these 'interagency agreement' provisions as shifting the obligation for paying for specific [VR] services to colleges and universities. State [VR] agencies still have that responsibility." Congressional Record–House, H6692, July 29, 1998.

C. Reading the Two Sets of Requirements Together

How does all of this apply to a college student needing AT? Let's say a college student who is deaf is funded by the VR system to attend college to study to become an accountant. Everyone agrees that for certain courses, the only way the student will be successful is to have real time captioning during classes. As noted above, AT (rehabilitation technology) is exempt from the comparable benefit requirement. Therefore, one approach would be to say that since real time captioning is AT, it is the sole responsibility of the VR agency to provide this service. However, this could certainly be seen as "pushing the envelope." Therefore, the state, in its VR Plan, could decide to indicate that the VR agency and public colleges will share this cost. In such a case, the IPE will indicate that the real time captioning will be the joint responsibility of the VR agency and college. *See* 29 U.S.C. § 722(b)(3)(E). If the college does not provide its agreed upon support, the VR agency must still ensure that the real time captioning is provided to the student, but may seek reimbursement from the college for its costs.

What about a student who is blind and uses a computer with voice output to read? The college would have an independent obligation, under Section 504, to ensure that its programs are accessible. Therefore, it would be responsible for ensuring that the library's resources are available to the student. It could meet its obligation by providing its card catalogue on computer with a dedicated computer with voice output to allow the student to have access to the materials in the library.

What if this same student was working on a term paper and needed to read a book located in the library? Would the college have to provide a reader or otherwise make that book accessible to the student for individual research? As noted above, the regulations under Section 504 exempt colleges from providing auxiliary aids and services for personal use or study. 34 C.F.R. § 104.44(d)(2). The relevant ADA regulations also exempt personal devices and services. 28 C.F.R. §§ 35.135 and 36.306. One could argue that reading a book to write a term paper is for personal study, even though the book is located in the library. Under this analysis, the college would not be required to provide this service to the student. If a college is under no obligation to provide assistance in such circumstances, there is no comparable benefit and it becomes the sole responsibility

of the VR agency. Another way to resolve this question would be to have the VR agency provide a hand held scanner for the student and for the college to assure that there would be a location within the library for the student to use the device.

X. Hearing and Appeal Rights

Anyone seeking or receiving VR services who is dissatisfied with a decision by the VR agency has a right to appeal. Rehab '98 makes some significant changes in the appeal process. Each state must establish procedures governing appeals, which must include the right to mediation and an administrative hearing before an impartial hearing officer. 29 U.S.C. § 722(c)(1). The VR agency must notify individuals, in writing, of their right to mediation, an impartial hearing and the availability of the Client Assistance Program (CAP) at the following times: at the application; when the IPE is developed; and upon the reduction, suspension or cessation of VR services. *Id.* § 722(c)(2)(A).

CAP is also funded under the Rehabilitation Act. *Id.* § 732(a). Therefore, there is a CAP office in every state. CAP is designed to provide information to individuals concerning their rights in the VR process and to provide advocacy services in resolving disputes, including representation at impartial hearings. Individuals who do not understand the proposed IPE, have questions about their rights under the Rehabilitation Act, or receive an adverse decision from the VR agency, should consider contacting the appropriate CAP office for assistance.

Rehab '98 added mediation as an available means of resolving disputes between consumers and the VR agency. It must be offered to resolve disputes, at a minimum, whenever an impartial hearing is requested. Participation must be voluntary and involvement in mediation cannot be used to deny or delay the right to an impartial hearing. The state bears the costs of mediation. All discussions that occur during mediation are confidential and cannot be used at any subsequent hearing. *Id.* § 722(c)(4).

At an impartial hearing, the individual has the right to be represented by an attorney or other advocate. Both the individual and the agency can present evidence and cross examine witnesses. 34 C.F.R. § 361.57(b)(3). The hearing decision is final and must be implemented, unless appealed. *Id.* § 361.57(b)(3).

Rehab '98 also makes significant changes in the availability of a second level of administrative review. Under prior law, the VR agency could review a hearing decision on its own motion. This is no longer true. A state may establish a procedure for a second level of administrative review. The review officer must be the chief official of the designated state VR agency or an official from the office of the Governor. If the state does establish a second level of administrative review, either party may appeal within 20 days of the hearing officer's decision. The review officer cannot overturn a hearing decision unless, based on clear and convincing evidence, the decision is "clearly erroneous" based on an approved State VR Plan, federal law or state law or policy that is consistent with federal law. 29 U.S.C. § 722(c)(5)(D)-(F).

Rehab '98 also adds a private right of action under Title I. *Id.* § 722(c)(5)(J). Therefore, either party may appeal a final administrative decision to state or federal court. However, pending review in court, the final administrative decision shall be implemented. 29 U.S.C. § 722(c)(5)(I). The right to bring a court action under Title I of the Rehabilitation Act bears a striking resemblance to the language under IDEA. 20 U.S.C. § 1415. As a result, the case law interpreting the IDEA right to bring court cases will most likely be applicable when interpreting these provisions. For example, the courts have held that one cannot bypass the administrative hearing process under IDEA and bring a case directly to court. *See Riley v. Ambach*, 668 F.2d 635 (2nd Cir. 1981); *Thomas v. East Baton Rouge Parish Sch. Bd.*, 29 Individuals with Disabilities Law Reporter 954 (M.D. La. 1998). It is likely that courts will also require exhaustion of the administrative process before a court action can be started under Title I of the Rehabilitation Act.

Finally, because the statute is silent on the issue, it can be presumed there is no right to attorneys' fees. *See Smith v. Robinson*, 468 U.S. 992 (1984). However, under IDEA, a parent could maintain an action under 42 U.S.C. § 1983, with its attendant attorneys' fees provision, where the issue was denial of access to the procedures under IDEA. *See Quackenbush v. Johnson City School Dist.*, 716 F.2d 141 (2nd Cir. 1983), *cert. denied*, 465 U.S. 1071 (1984). Presumably, this same reasoning will apply to Title I of the Rehabilitation Act. In *Petsinger v. Office of Vocational Rehabilitation*, No. Civ.A. 96-4433, 1997 WL 634505, 11 National Disability Law Reporter ¶ 60 (E.D. Pa. 1997), the court held just that. The court granted summary judgement to the plaintiff under 42 U.S.C. § 1983 because the VR agency had denied the plaintiff the right to a fair hearing. The court found that the VR agency's "arbitrary withdrawal of Petsinger's appeal deprived him of a fair hearing as required by statute." Accordingly, the court also permitted the attorneys to request fees under 42 U.S.C. § 1988. Although the case was decided before the enactment of Rehab '98, there is nothing in either the court's decision or in Rehab '98 which would affect the court's decision.

XI. Conclusion

The VR system can be a crucial resource for AT for people with disabilities who are planning to enter the workforce. Over the years, Congress has continued to strengthen the role of consumers in the VR process and enhance the availability of AT.

Congress and the federal RSA have also, over time, strengthened the mandate of state VR agencies to provide a range of services to maximize employability and economic self-sufficiency. Although the reading of the maximization requirements by the courts to date has yielded mixed results, the language of the law, regulations and policy directives continues to support a reading that favors maximization of employment in individual cases. This suggests that the handful of court decisions that have ruled otherwise may be attributable to the individual facts presented.

Overall, Title I of the Rehabilitation Act provides a very comprehensive set of services, including AT, that can be funded to prepare individuals for the world of work. Hopefully, this booklet will provide the reader with a good reference tool for accessing those services.

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